No. 12528

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant,

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, individually; LESTER COWAN, doing business as LESTER COWAN PRODUCTIONS, and BULOVA WATCH COMPANY, INC.,

Appellees.

BRIEF OF APPELLEE BULOVA WATCH COMPANY, INC.

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TABLE OF AUTHORITIES CITED.

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Introductory Statement.

To spare this Honorable Court any unnecessary repetition, appellee Bulova hereby joins in the brief submitted by the producer appellees in this cause, without restating the grounds and arguments therein set out in support of appellees' position that the District Court's judgment of dismissal should be affirmed. This brief will be devoted primarily to appellant's Point V, which is directed at appellee Bulova.

Statement of Appellee Bulova's Contentions.

In addition to the contentions raised by producer appellees, appellee Bulova urges that no cause of action can be stated for inducing the breach of contract where the complaint shows that the contract was not in fact breached but was fully performed as contemplated; that there can be no cause of action stated for a conspiracy to induce action where the action allegedly induced was lawful; and that no cause of action for unfair competition or interference with advantageous economic relations can be stated under the law of California under any theory whatsoever under the allegations of appellant's complaint.

I.

Appellee Bulova Cannot Be Charged With the Inducement of a Breach of Contract Where the Complaint Shows That Appellant Received Full Performance as Contemplated by the Contract and There Is Therefore No Breach.

Appellee Bulova will not in this brief argue further the existence, unambiguity, and full performance of the contract as fully developed in producer appellees' brief.

A leading California case affirming a judgment entered after sustained demurrer is *Sweeley v. Gordon* (1941), 47 Cal. App. 2d 385 at 387, where the court upon rehearing said that the ". . . cause of action was based upon allegations that Neubeiser wrongfully induced Gordon to violate his contract with plaintiff and to assert the invalidity of the contract because of the failure to comply with the statute of frauds. Gordon had the legal right to stand

upon the statute of frauds and Neubeiser did not become liable in damages to plaintiff if he did in fact induce Gordon to stand upon his legal rights."

Sweeley v. Gordon (1941), 47 Cal. App. 2d 385.

Clearly, appellant can state no cause of action against appellee Bulova by alleging that Bulova induced appellee Cowan to do what he was legally entitled to do.

II.

Appellee Bulova Cannot Be Charged With Conspiracy When the Act Alleged to Be the Subject or Object of the Conspiracy Is Lawful.

A leading California case in support of this contention, also affirming a judgment of dismissal following a sustained demurrer, is *Harris v. Hirschfeld,* 13 Cal. App. 2d 204, where the court said at page 206: ". . . conspiracy is not actionable unless the combination results in the perpetration of (1) an unlawful act, or (2) some injurious act by lawful means." In that case the court held that no cause of action, for conspiracy or otherwise, lay where the defendant's act was to induce the termination of a partnership at will.

Harris v. Hirschfeld, 13 Cal. App. 2d 204.

In the case at bar, appellant does not allege any unlawful means, and the act alleged is clearly lawful as it was contemplated specifically by the parties and clearly expressed in the contract.

III.

Appellant Under the Allegations Pleaded Does Not State a Cause of Action for Unfair Competition on Any Theory Whatsoever.

The tenuousness of appellant's position is apparent in the following quotation from page 50 of appellant's brief:

> "We, of course recognize that in many instances interferences with normal business relations have been justified on the theory that normal business competition is bound to result in some such interferences and hence that any damages arising therefrom is not actionable. However, we do not believe that the law permits any and all interferences under the guise of competition, and we think that the circumstances of the present case are such as to 'bring it outside the ordinary course of competition,' within the language of the California Supreme Court decision just above cited, Buxbom v. Smith."

Contrary to appellant's statement and authorities, the alleged facts in this case differ materially from the cited cases and fall far short of the criteria set up by the law basic to the imposition of liability in the competitive field. As stated by appellant (B. 23), Gruen and Bulova are principal and intense competitors, as befits two of the largest watch manufacturers in the world.

The law of unfair competition, especially as to the activities of third persons, is a relatively modern development. As is true in any new non-statutory field of law, the early cases involve the most flagrant abuses, and the

refinements of theory follow subsequently. That is why the Restatement of Torts admits the difficulty of laying down precise rules but summarizes the law as follows in subsection (1) of Section 768:

> "Privilege of competition.
>
> "One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if
>
> "(a) the relation concerns a matter involved in the competition between the actor and the competitor and
>
> "(b) the actor does not employ improper means, and
>
> "(c) the actor does not intend thereby to create or continue an illegal restraint of competition, and
>
> "(d) the actor's purpose is at least in part to advance his interest in his competition with the other."
>
> *Restatement of Torts*, Sec. 768(1).

The facts alleged by appellant clearly bring the case at bar within the cited Restatement section. California follows the Restatement rule, and the applicable law is very clearly set forth in the leading case of *Katz v. Kapper* (1935), 7 Cal. App. 2d 1, where the court again affirmed a judgment entered after sustaining a demurrer to the complaint. The case involved defendants' attempt to induce plaintiff's customers to deal with defendants instead. At page 4 the court said:

> "The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or de-

ceit which are unlawful. Any extension of this jurisdiction must come through legislative action. In this case no questions of statutory law are involved."

Katz v. Kapper (1935), 7 Cal. App. 2d 1, 4.

The court further said on page 6:

"The alleged acts of defendants do not fall within the category of business methods recognized as unlawful, and hence they are not actionable. The demurrer to the complaint was properly sustained."

Katz v. Kapper (1935), 7 Cal. App. 2d 1, 6.

Clearly the acts alleged in the case at bar do not come close to those alleged in the *Katz* case, where no liability was found.

Firstly, in the *Katz* case, and in the others cited by appellant where liability was found, the interference alleged was directly with the fruits of the contractual relationship or the physical product of the plaintiff. In the case at bar no Gruen products or customers are involved, rather only an asserted right on the part of Gruen to seek to gain prospective customers by advertising.

Secondly, appellant does not allege any unfair methods by Bulova, but merely an "interference" variously categorized as to motive but not method.

Further, appellant should hardly be in a position to complain as the complaint shows [R. 12] that appellant in the exercise of its business judgment chose not to join in a joint advertising campaign, after being offered a prior opportunity to do so.

It therefore appears that appellant has failed to plead allegations which will bring it within any legally recog-

nized theory affording relief. While there are, as has been shown, limits beyond which a competitor legally may not go, the facts alleged here fall so far short of the prerequisites legally required that appellees respectfully urge that this Honorable Court affirm the correctness of the District Court's ruling that the parties determined the limits of their liability in clear unequivocal language.

The complaint at most shows a usual competitive situation only indirectly related to product or present consumers. The acts charged to Bulova, if true, constitute merely normal business activity that has long been legally recognized as permissible.

The cases cited by appellant may be easily distinguished from the factual situations alleged by appellant in its complaint.

(1) *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34 (cited B. 46).

This case involved a contract terminable at will, whereas the case at bar involves one of two alternative performances each unqualifiedly specified in the written contract. Further, the court apparently based its decision on the restraint of trade involved in defendants' actions, for at page 41 the court said:

> "The answer to the question whether defendants are liable for interference with plaintiff's contractual relations therefore depends on whether plaintiff has stated a good cause of action against defendants for injury to his business by activities in restraint of trade."

(2) *Romano v. Wilbur Ellis & Co.* (1947), 82 Cal. App. 2d 670 (cited B. 48).

This case also involves a contract terminable at will, with the further allegation, not present in the case at bar, of alleged false misrepresentations inducing the termination.

(3) *Buxbom v. Smith* (1944), 23 Cal. 535 (cited B. 48).

The cited case involves deliberate action on the part of defendants which directly induced plaintiff to alter his business practices and build up a distributing organization which was then pirated. In the case at bar there was no direct contact between Gruen and Bulova, and Gruen certainly did not take any action as a result of conduct or representations of Bulova.

(4) *Newark Hardware & Plumbing Supply Co. v. Stove Mfgrs. Corp.* (1948), 136 N. J. L. 401, 56 A. 2d 605 (cited B. 50).

The cited case involves a physical misappropriation of plaintiff's goods which would otherwise have been sold by him. The result in the case is easily supportable on a simple conversion theory and is not really an unfair competition case.

(5) *Owen v. Williams* (1948), 332 Mass. 356, 77 N. E. 2d 318 (cited B. 51).

In this case the court held that the defendant was not privileged as the jury could find he was acting unreasonably and in bad faith, with no gain to himself. The court recognized that a privilege could easily exist under the circumstances. The facts involved in the present case are

not analogous, as the case at bar involves a normal, albeit intense, commercial rivalry tending to stimulate efficient production to the ultimate benefit of the consuming public.

Conclusion.

Therefore, because appellant cannot establish a breach of contract by producer appellees, no liability can be asserted against appellee Bulova for alleged interference therewith. It is submitted that the complaint shows that Gruen finds itself in what it deems to be an unfavorable competitive position solely as a result of its own actions and that therefore the judgment of the court below should be affirmed.

Respectfully submitted,

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